NO. 83-606

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CITY OF MISSION, SOUTH DAKOTA, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF THE STATES OF SOUTH DAKOTA, MONTANA AND IDAHO AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Did Congress, when it excluded "fee-patented lands in non-Indian communities" from the definition of Indian country in 18 U.S.C. §§ 1154(c) and 1156, intend that the term "community" would include municipalities, such as Mission, South Dakota; and if so, whether Mission, which is incorporated and functions under State law and has a substantial non-Indian population, is "non-Indian" for purposes of those laws?

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INTEREST OF THE AMICI STATES OF SOUTH DAKOTA, MONTANA AND IDAHO

Well-defined jurisdictional lines are vital to the law enforcement officials of any state. For the most part, the jurisdictional authority of a state within an Indian reservation is set by federal law. The proper

delineation and interpretation of these jurisdictional limits is particularly important to the Attorneys General of the amici States because of the number of Indian reservations, as well as numerous parcels of off-reservation trust land and potential dependent Indian communities located within those States. There are at least six recognized Indian reservations in South Dakota, seven in Montana and five in Idaho. Like all states, the amici States regulate liquor traffic as part of their general "police power", recognizing that they have a duty to balance effectively the well-known deleterious effects of alcohol availability against the responsible consumption of alcoholic beverages which numerous citizens, both on and off Indian reservations find enjoyable.

Most of the Indian Reservations in South Dakota, Montana and Idaho are not isolated, purely Indian enclaves. In Montana, for

example, the total population of the five reservations, where liquor transactions take place, is approximately 39,900 people.[1] More than half of this population--approximately 23,360--are non-Indians. For instance, approximately eighty-seven percent (15,852) of the 19,628 people on the Flathead Indian Reservation are non-Indian; approximately fifty-six percent (5,648) of the 9,921 people on the Fort Peck Indian Reservation are non-Indian; and approximately twenty-five percent (1,578) of the 6,660 on the Black Feet Indian Reservation are non-Indian.[2]

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[1] Montana operates liquor stores on the five Indian Reservations where alcohol sales take place. For example, the total sales in those state stores alone amounted to $2,497,222 in fiscal year 1981. Many of these state stores are within the boundaries of incorporated cities or towns on the reservation.

[2] The source for this information is Census of Population and Housing, 1980: P.L. 94-171, Population Counts, Summary tape file.

Moreover, most of the reservation in the amici States have large areas of fee-patented land within their boundaries. Located within these areas are a number of incorporated municipalities. In many cases, large percentages of the on-reservation non-Indian populations reside within the corporate city or town limits within the Indian reservations, where the states have issued liquor licenses. And, the liquor regulation laws of the amici States are all-encompassing.

Obviously, the amici States have an important interest in insuring that their state-wide liquor licensing and regulation remains in tact. "Indian Country", as defined in 18 U.S.C. §§ 1154(c) and 1156, specifically excludes fee-patented lands in non-Indian communities from the application of the federal Indian liquor laws, and therefore from the need for compliance with tribal

liquor ordinances. See, for example, Rice v. Rehner, ___ U.S. ___, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983). It is of vital importance to the amici States that they be able to determine with reasonable certainty whether a given area or population within an Indian reservation is a "non-Indian Community", for purposes of the federal liquor laws. This is especially important because of the large non-Indian populations on Indian reservations in the amici States. It is also important because the Amici have been confronted with tribal ordinances providing for exclusive tribal licenses or restricting tribal permits to enrolled tribal members.

In this action, the lower federal courts have disregarded the common meaning of the term "community" to determine that the "non-Indian community" exclusion does not apply to the City of Mission, South Dakota, and the

Mission Golf Course. In making this particular determination, the United States District Court for the District of South Dakota used an analysis that is very similar to the analysis established by the Court of Appeals to define a "dependent Indian community," as that term is used in 18 U.S.C. § 1151.

The lower courts' decision in this matter has therefore inextricably intertwined the analysis of the "non-Indian community" question with the analysis of the "dependent Indian community" question. Both of these determinations will likely have a great impact upon the jurisdiction possessed by the amici States in relation to both the Indian tribes and the federal government. As the state officials charged with the duty to represent their States in all legal matters, the Attorneys General of the amici States are very interested in insuring the propriety of

the determination of whether an area is, in fact, a "non-Indian community" under the appropriate federal statutes. A determination of whether a given population or area is a "non-Indian Community" must be made in a way that is fair, reliable, and consistent. To make such a fair, reliable, and consistent determination demands that incorporated cities and town limits on Indian reservations not be ignored.

FEDERAL STATUTES INVOLVED

The following federal statutes are involved in this matter:

(a) 18 U.S.C. § 1151:

> Except, as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent

Indian communites within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

(b) 18 U.S.C. §§ 1154(a) and (c):

(a) Whoever sells, gives away, disposes of, exchanges, or barters any malt, spirituous, or vinus liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, except for scientific, sacramental, medicinal or mechanical purposes, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom an allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian who is a ward of the Government, under charge of any Indian superintendent, or to any Indian, including mixed bloods, exercises guardianship, and whoever introduces

or attempts to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.

* * * *

(c) The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto.

(c) 18 U.S.C. § 1156:

Whoever, except for scientific, sacramental, medicinal or mechanical purposes, possesses intoxicating liquors in the Indian country or where the introduction is prohibited by treaty or an Act of Congress, shall, for the first offense, be fined not more than $500 or imprisoned not

more than one year, or both; and for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.

The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto.

(d) 18 U.S.C. § 1161:

The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

REASONS FOR GRANTING THE PETITION

I

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT.

The decision of the United States District Court for the District of South Dakota, United States v. Mission Golf Course, Inc., 548 F.Supp. 1177 (D.S.D. 1982), which was affirmed by an unpublished per curiam decision by the Court of Appeals, United States v. Mission Golf Course, Inc., No. 82-2516 (8th Cir. May 16, 1983), held that the City of Mission and the Mission Golf Course must conform to the tribal liquor ordinances of the Rosebud Sioux Tribe before they can engage in the sale of intoxicating liquor within the borders of the reservation. This conclusion is based on the lower courts' determination that the City of Mission was

not a "non-Indian community." A "non-Indian community" is excluded from the requirement to observe tribal liquor laws by the provisions of 18 U.S.C. §§ 1154(c) and 1156. The District Court, and the Court of Appeals through its affirmance of the District Court's decision, based this conclusion on a reading of this Court's decision in United States v. Mazurie, 419 U.S. 544 (1975).

As is set out in detail in the Petition, the lower courts misapplied the holding from the Mazurie decision. Because the States concur with the Petitioners' analysis in this regard, a detailed argument on this point will not be made. One significant area, however, will be discussed. Even after Mazurie, in the context of the "non-Indian community" exclusion at question here, a city or town was understood to be a "community." Mazurie simply stated, in response to a constitutional vagueness argument, that the

term "community" was not limited to cities and towns. Mazurie, 419 U.S. at 552-553. The lower courts, however, misconstrued this holding. The District Court in this case engaged in an extensive examination of the surrounding territory to determine whether a "community" existed. This is inconsistent with this Court's decision in Mazurie. see also, United States v. Morgan, 614 F.2d 166 (8th Cir. 1980). It is also inconsistent with the congressional intent exhibited in relation to sections 1154(c) and 1156 at the time they were enacted. See, H.R. Rep. No. 352, 81st Cong., 1st Sess. (1949); S.Rep. No. 303, 81st Cong., 1st Sess. (1949). For this reason the Petition of the City of Mission and the Mission Golf Course should be granted.

II

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The question presented in this Petition has never been directly addressed by this Court. When this fact is coupled with the fact that the lower courts have seriously misapplied this Court's prior decision dealing with the "community" determination under sections 1154(c) and 1156, the reasons for granting the Petition become more compelling.

The reasons for granting the Petition are further enhanced by the fact that the lower courts have also misapplied their own precedent from the related area involving the "dependent Indian community," as that term is used in 18 U.S.C. § 1151(b), in making the "community" determination necessary under sections 1154(c) and 1156. This decision therefore causes confusion not only in the "non-Indian community" context, but in the "dependent Indian community" context as well. A decision by this Court is necessary to eliminate this confusion.

Finally, the amici States submit that the practical problems necessarily related to a case-by-case determination of whether a certain municipality is a "community" within the provisions of sections 1154(c) and 1156 require a definitive resolution by this Court. This Petition presents the Court with the opportunity to provide this resolution.

A. The "community" determination within the context of the "dependent Indian community."

Not only is the "community" determination made by the lower courts in this case inconsistent with this Court's decision in Mazurie, but it is also inconsistent with its own decisions in the related area of the "dependent Indian community," as that term is used in 18 U.S.C. § 1151(b).[3] These decisions

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[3] The District Court raised the "dependent Indian community" question when it made the following observaton:

> Though not directly on point, several other cases deal with the

have held that cities and towns are "communities" with the meaning of this jurisdictional statute. Morgan, supra; United States v. Mound, 477 F.Supp. 156 (D.S.D. 1979); Weddell v. Meierhenry, 636 F.2d 211 (8th Cir. 1980), cert. denied, 451 U.S. 941 (1981); United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981), cert. denied, ___ U.S. ___, 103 S.Ct. 52, 74 L.Ed.2d 58 (1982).[4]

> question of what constitutes a dependent Indian community under 18 U.S.C. § 1151(b), and establish factors which are relevant to the Court's inquiry here.

Mission Golf Course, 548 F.Supp. at 1179 (citations omitted.)

[4] Although not an issue in this Petition, it is at least the position of the State of South Dakota that the United States Court of Appeals for the Eighth Circuit has also misinterpreted this Court's decisions dealing with the determination of "dependent Indian communities" under 18 U.S.C. § 1151(b). The Court of Appeals has required extensive factual findings in order to make the determination of whether a certain parcel of land is to be considered a "dependent Indian

This series of decisions dealing with the "community" determination under section 1151(b), when combined with the lower courts' decision in this case dealing with the "community" determination under sections 1154(c) and 1156, effectively eliminates any judicial consistency in the "community" determination. The only consistency in these cases is that the lower courts have taken a position favoring federal jurisdiction. If federal jurisdiction can be determined by considering

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community." This procedure is unnecessary. The term "dependent Indian community," as it was codified in 18 U.S.C. § 1151(b), is based upon this Court's decisions in United States v. Sandoval, 231 U.S. 78 (1913), and United States v. McGowan, 302 U.S. 535 (1938). In each of these decisions, the Court states that only Congress can make the determination of whether or not certain parcels of land are within federal jurisdiction. The key inquiry, therefore, is whether Congress had manifested an intent to have a particular community recognized as a "dependent Indian community" requiring the special guardianship and protection of the United States. The process created by the Eighth Circuit certainly goes beyond the very limited review required by this Court.

a city or town to be a "community" by itself, the courts have been willing to so hold. On the other, if the surrounding area must be considered in order to reach a conclusion that the area is under federal jurisdiction, the courts have been willing to ignore corporate boundaries. The latter is precisely what occurred in the instant litigation.[5] Because of the inconsistencies and uncertainties involved in this analysis, the

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[5] In this particular case, the question revolves around a relatively small municipality in south-central South Dakota. There are, in fact, large municipalities, such as Tacoma, Washington [Puyallup] and Green Bay, Wisconsin [Oneida], which have opened Indian reservations within their exterior boundaries. See also, Transcript of Oral Argument 24-25, Rice v. Rehner, ___ U.S. ___, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983). An interpretation of the "non-Indian community" exclusion in sections 1154(c) and 1156 by the federal courts of appeal in which these larger municipalities are located and which would follow the precedent set by the lower courts in this case could have a profound effect on liquor licensing requirements within these municipalities.

Petition should be granted so that this Court can resolve this important jurisdictional question, and set some guidelines for future matters involving the "community" determination found in sections 1151(b), 1154(c) and 1156.

B. The problems affecting local officials

The inconsistencies in the lower courts' analysis, as highlighted in this brief, and as detailed in the Petition, have created and will continue to create serious problems for the officials of the State of South Dakota and potentially, for the other amici States because of the jurisdictional uncertainties created by the decision. The present judicial standard--the favoring of federal jurisdiction--is no standard at all.

The decision of the lower courts will invite continued litigation over whether a certain city or town is a "community" within

sections 1151(b), 1154(c) and 1156. Prior to the instant decision, this was not an issue because such entities were considered "communities." Such case-by-case adjudication can only lead to more jurisdictional uncertainties and problems. The problems and confusion created by the lower courts' ruling in this case affect not only the state, but also federal and tribal officials. A decision by this Court on the issue of the "community" determination under sections 1151(b), 1154(c) and 1156 is needed to eliminate these problems and confusions.

CONCLUSION

Based on the foregoing arguments and authorities, the State of South Dakota, Montana and Idaho, as amici curiae in support of the Petitioners City of Mission, South Dakota and Mission Golf Course, pray that the Petition for Writ of Certiorari be granted.

The amici States also join in the Petitioners' alternative request for summary reversal of the decision of the lower federal courts in this matter.

Respectfully submitted,

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